UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEMOCRATIC PARTY WASHINGTON STATE, *et al.*,

Plaintiffs,

v.

SAM REED, as Secretary of State of the State of Washington *et al.*,

Defendants.

REPUBLICAN STATE COMMITTEE OF WASHINGTON, *et al.*

Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Intervenors,

WASHINGTON STATE GRANGE, *et al.*,

Intervenors.

Case No. C00-5419FDB

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFFS DEMOCRATS' and INTERVENORS REPUBLICANS' MOTIONS FOR SUMMARY JUDGMENT

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WASHINGTON STATE DEMOCRATIC PARTY V. REED, et al. No. C00-5419FDB

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I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs, Washington State Democratic Party, *et al.* (hereafter Democratic Party); Defendants Sam S. Reed, as Secretary of State, *et al.* (hereafter Reed, Secretary of State, State, or Defendants); and Intervenors Republican Party of The State of Washington, *et al.* (hereafter Republican Party).

Intervenors Libertarian Party of Washington State, *et al.* (hereafter Libertarian Party) and Intervenors Washington State Grange, *et al.* (hereafter The Grange) have filed responsive memoranda, as have the other parties to each of the summary judgment motions. The motions are ready for the Court's consideration.

Defendant Reed has filed three motions to strike certain declarations submitted by the Democratic and Republican parties, and these, too, are at issue and ready for the Court's consideration.

On March 8, 2002, the Court held oral argument on the summary judgment motions. The Plaintiffs, Defendants, and Intervenors participated in oral argument, and they presented their views and responded to questions from the Bench. The Grange submitted a document, marked in evidence, that further supported its case. While the Grange said that it could submit further evidence should the Court hold a full trial, it admitted that such evidence would merely reinforce what it has already presented. The other parties were in agreement that this matter is ready for the Court's decision on the cross motions for summary judgment.

The Democratic Party seeks a declaratory judgment that Washington State's blanket primary election system is unconstitutional because it imposes a severe burden on the First Amendment rights of the Party and its members and because the primary system either does not advance a compelling state interest or, to the extent that it does, there are other, less burdensome alternatives to advance those interests. The Democratic Party contends that the votes of those affiliated with the Party are substantially diluted by the votes of those who refuse to affiliate with

the Party, or who are openly affiliated with the Republican party. As a result, contends the Democratic Party, election outcomes are altered, and the Democratic candidates who survive the blanket primary do not address Democratic issues in government to the extent that they would if they had to achieve re-nomination in a process in which Democratic votes were not diluted by the votes of non-Democrats.

The Republican Party argues that this case presents a straightforward issue of the application of clear U. S. Supreme Court precedent to uncontested material facts. The Republican Party states that the essential, uncontested facts are that Washington's blanket primary forces the Republican Party to have its standard-bearers in the general election chosen not only by Republicans, but also by Democrats, independent voters, and third party voters, thus altering the message of Republican candidates. The Republican Party argues that this adulteration of the Republican Party's message and candidate selection process, alone, is sufficient for the blanket primary to be an unconstitutional invasion of First Amendment rights.

Defendant Secretary of State Reed argues that the Constitution does not vest political parties with thc right to dictate the manner in which the voters select candidates for public office, and that voters in Washington do not participate in the primary as party members or affiliates, but as the general electorate winnowing the field and choosing nominees to qualify for the general election ballot. Furthermore, Secretary of State Reed argues that the evidence submitted by the political parties is insufficient to satisfy their burden of showing that Washington's election system is unconstitutional.

The Grange Intervenors oppose the summary judgmcnt motions of the political parties arguing that the political parties have failed in their proof and that they likewise lose a test balancing the arguable impacts on the political parties' associational right with the legitimate, compelling interests protected and advanced by Washington's unique election system. The Grange

argues that their First Amendment rights as a non-partisan association advance their political interests best in this system allowing them to vote for candidates from either party.

The Libertarian Party opposes Defendant Secretary of State Reed's motion for summary judgment arguing that because it is smaller than the two major parties, its ability to preserve its core political values and advance its political message is at greater risk. The Libertarian Party had a right to nominate its own candidates until the 2000 election, but now as a fledgling major party, it has not been shown that it has the ballot strength to preserve the integrity of its message or to withstand the dilution of its ballot strength by multiple persons filing as Libertarian candidates who may not be affiliated with or sympathetic to the goals and messages of the party. Furthermore, the Libertarian Party argues that it does not need opinion testimony to demonstrate harm, that the harm, or risk of harm is obvious.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 *U.S. 317, 322-323 (1986). Summary judgment is proper if a defendant shows that there is no* evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The substantive law governs whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 630-31 (9th Cir.*

1987). All reasonable doubts as to the existence of a material fact are resolved against the moving party. *Id.* at 631. Summary judgment is not appropriate if the credibility of witnesses is at issue. *Securities and Exchange Comm. V. Koracorp Industries, Inc.*, 575 F.2d 692, 699 (9th Cir.), *cert. denied*, 512 U.S. 1236 (1994).

The party alleging the unconstitutionality of a statute has the burden of proof. A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509, U.S. 312, 320 (1993), citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

III. DISCUSSION

A. LEGAL BACKGROUND

The issue before the Court is whether Washington's blanket primary is unconstitutional in view of the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). That case addressed the issue of whether California's primary system unconstitutionally burdened the political parties' First Amendment right of association. This right of association, derived from freedom of speech and assembly, was clearly announced in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958): "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.." The Supreme Court held in *California Democratic Party*:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the "basic function of a political party," *ibid.* – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82. The Supreme Court then turned to the seven state interests claimed to be compelling.

The Supreme Court found two of the asserted interests – producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns – to be no more than circumlocutions for producing nominees and nominee positions other than those the parties would choose. The third interest – ensuring that disenfranchised persons enjoy the right to an effective vote – was seen as being merely a recharacterization of the nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. The Court said that the "disenfranchised" voter was actually a voter who was not a member of the majority party in a "safe" district. The four remaining interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – "are not, like the others, automatically out of the running; but neither are they *in the circumstances of this case*, compelling." 530 U.S. at 584 (emphasis in the original). The Court said that the determination of whether these asserted state interests are compelling

> ... is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant.

530 U.S. at 584 (emphasis in original).

The Court then found all four of the asserted state interests not to be compelling. The Court saw the fairness issue as relating to the perceived inequity of nonparty members in "safe" districts not being allowed to determine the party nominee; the Court saw that "inequity" as less unfair, if it was unfair at all, than "permitting nonparty members to hijack the party." *Id.* The matter of affording voters greater choice failed because "it is obvious that the net effect of this scheme – indeed, its avowed purpose - is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." *Id.* (emphasis in original). This resulted in the range of choices favored by the majority of voters being increased. The interest of increasing voter participation was a variation on the greater choice theme and suffered from the same defect, in the Court's view. Finally, the Supreme Court did not think that the privacy interest, the confidentiality of one's party affiliation,

could be considered in all cases to be a "compelling" one, reasoning that "[I]f such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices." *Id.* at 585. In conclusion, the Supreme Court said that even if all four interests were compelling, Proposition 198 was not a narrowly tailored means of furthering them.

The Court then went into a description of a type of primary that would protect these interests, a *nonpartisan* blanket primary. Under such a primary, the state determines the qualifications required for a candidate to have a place on the primary ballot – nomination by established parties, voter-petition requirements for independent parties – then each voter, regardless of party affiliation, may vote for either candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. In the Court's view, this system

> "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association."

Id. at 585-86.

B. WASHINGTON'S PRIMARY

In analyzing whether Washington's primary election system impermissibly burdens political parties' associational rights, it is important to understand Washington's primary system as compared with that of California against the background of the Supreme Court's reasoning. Washington's historical perspective is relevant as well when analyzing Washington's primary, because the State's interests in this blanket primary are animated by the electorate's evident desires over a long period of time.

The United States Constitution leaves it to the states to regulate elections. The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

Legislature thereof." The states also have broad control over the election process for state offices. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 , 217 (1986). Nevertheless, this "state action" in regulating elections must be informed by other Constitutional provisions such as those contained in the First and Fourteenth Amendments.

California Democratic Party described the California system. In California, a candidate for public office gains access to the general election ballot by winning a political party's primary or by filing as an independent and receiving a certain percentage of votes. Party membership is defined through public registration. Until 1996, California held "closed" partisan primaries, in which only persons who were members of the political party – those who declared their affiliation when they registered to vote – could vote on the party's nominee. In 1996, via Proposition 198, California changed its closed primary to a blanket primary. After 1996's Proposition 198, each voter, rather than receiving a ballot with candidates of his own declared party, received a ballot that listed every candidate regardless of party affiliation and allowed the voter to choose freely among them. It remained the case that the partisan candidate receiving the greatest number of votes is the nominee of that party at the ensuing general election.

In Washington, there is no provision for registering voters by party affiliation. (*RCW 29.07.070 Voter qualification information – Verification notice*) A candidate who desires to have his or her name printed on the ballot for election to office other than president or vice president of the United States must file a declaration and affidavit of candidacy, and among other things, shall indicate a party designation, if applicable. (*RCW 29.15.010 Declaration and affidavit of candidacy*) A candidate for a partisan office qualifies for having his name on the general election ballot if that candidate receives at the primary election at least one percent of the total number of votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office. (*RCW 29.30.095, Partisan candidates qualified for general election*)

Political parties are much more in the forefront under California's election law. For example, in Washington, while a candidate for office indicates, if applicable, a party designation, in California, a candidate must present a declaration of candidacy, which will not be filed unless the candidate shows in his affidavit of registration that he has been continuously registered as being affiliated with the political party the nomination of which he seeks for at least three months immediately prior. *(Cal. Elect. Code § 8001) An elections official attaches a certificate to the* candidate's declaration showing the date on which the candidate registered his or her affiliation with the political party the nomination of which is sought, and indicating, furthermore, that the candidate has not been affiliated with any other qualified political party for the three-month period specified. *Id.* Thus, California election law provided that at the primary, a candidate had to pass some muster in demonstrating that he or she was among the party faithful. Then, until 1996, the voters who had declared in their registration forms that they were affiliated with a particular political party (Cal. Elect. Code § 2150) would receive a ballot consisting only of candidates of that political party, and they would then vote for their choice. The candidate who received the highest number of votes for each office would become the nominee of that party in the ensuing general election. Thus, for the ensuing general election, Democrats chose their standard bearers for each office and Republicans chose their standard bearers.

Then an initiative statute was adopted following the voters' March 1996 adoption of Proposition 198. The initiative backers promoted the blanket primary largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See California Democratic Party*, 530 U.S. at 570. Thereafter, all persons entitled to vote, including those not affiliated with any political party, were allowed to vote for any candidate regardless of the candidate's political affiliation. The result was that known, registered Democrats and known, registered Republicans were allowed to vote for any Republican or Democrat or other candidate. The partisan candidate receiving the most votes at the primary became the nominee of that political

party at the ensuing general election regardless of the party affiliation of voters who voted for that candidate.

In Washington, unlike California, a candidate for a partisan office need not first pass muster with a political party to which he chooses to align; the candidates simply self-declare their affiliation. Voters are not required to declare openly affiliation with one party or another in order to vote. This system is like the nonpartisan blanket primary described by the majority in *California Democratic Party*, except that rather than the top two (or other number) of vote getters moving on to the general election, Washington election laws allow those candidates receiving at least 1% of the total votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office to advance to the general election ballot.

Two provisions of thc Washington Constitution are relevant to the overall circumstances: (1) All qualified voters are entitled to vote at all elections. Wash. Const. Art. VI, § 1. (2) "All elections shall be by ballot. The Legislature shall provide for such method of voting as will secure to every elector absolute secrecy in preparing and deposing his ballot." Wash. Const. Art. VI, § 6.

The Grange Intervenors provided some historical information. Importantly, and distinct from California, Washington has never required voters to register by political party. The Washington Legislature passed a law in 1922 that would have required all voters to register by political party, but a constitutional referendum was immediately filed, and Referendum Measure 14 (1922) overwhelmingly – 2.5:1 against – rejected the law providing for party registration. The Washington Legislature also tried to adopt a system of "party primaries," including a loyalty oath requirement and giving political parties access to a list of voters participating in their primary. Again, a referendum petition was filed, and at the ensuing election, Referendum 15 (1922) was adopted and the "party primary" and list law was rejected by more than 2.5:1.

In 1933, the Grange, with support from other associations, circulated for voter signatures and qualified the "blanket primary" initiative. In 1934, the Legislature voted to enact the initiative

and adopted the blanket primary system. (Washington's Initiative No. 2 and 1935 Wash. Law. Ch. 26) The Washington blanket primary statute having been enacted by the State Legislature, does not suffer from the same infirmity – being enacted by popular initiative alone – that concerned the dissent in *California Democratic Party*, 530 U.S. at 602-03.

Since the Washington Legislature adopted the blanket primary, there have been legal challenges to the system and a jurisprudential history has developed that further elucidates the background circumstances in Washington. *Anderson v. Millikin*, 186 Wash. 602, 59 P.2d 295 (1936) upheld the constitutionality of Washington's blanket primary. *Anderson* held that as to the general objection that the law tends to destroy political parties, there is no concern of political parties in the constitution; the people in adopting both the state and federal constitutions went no further than to protect the elector in his right to cast a ballot; not a coerced party ballot, but for the candidate of his choice, whether he be upon one ballot or another. "Finding no guaranty, express or implied, in favor of either a candidate or a party in the constitution, it follows that he or his party *can claim no greater rights than the voter himself. The fountain cannot rise higher than its source.*" 186 Wash. at 606. The *Anderson* court also addressed an associational rights issue with an interesting point of view. The Court said that as to the argument that without the party test, those voters so inclined may elect Democrats as Republican precinct committeemen and vice versa,

> ...[i]t is not to be presumed that any voter will abandon his right to participate in the selection of the committeeman of his own party in order to foist an unwanted individual upon a party to which he is opposed. But whether so or not, the provisions now under consideration apply equally to all parties who may be affected thereby, and thus there is no discrimination in favor of or against any.

Id. at 607-08.

Next, there was *Heavey v. Chapman*, 93 Wn.2d 700, 611 P.2d 1256 (1980), which presented the question of whether the blanket primary (RCW 29.18.100 and those statutes implementing it RCW 29.30.010, .030) unconstitutionally restrict the plaintiffs' right of association under the state and federal constitutions. A unanimous Washington State Supreme Court held that they do not.

The *Heavey* Court asked whether the Plaintiffs (a political party and two of its members) have shown a substantial burden and answered:

> Not only have they not shown a substantial burden, but they concede they cannot do so. Plaintiffs seek to avoid establishing a substantial burden by asserting the court places a "burden of negative proof" on them to which they cannot respond because voter ballots are made secret by another separate state action, the secret ballot. Plaintiffs suggest we abandon the substantial burden test and instead adopt what they term the "modified review standard."

93 Wn.2d at 702-03. The Court declined to adopt the modified review standard and said that "we believe the failure of plaintiffs even to attempt to show a substantial burden to their right of association is dispositive of the case." *Id.* at 703. The Court stated: "... at the very least those who would overturn statutes on constitutional grounds should offer some evidence they have been harmed. Mere assertions of injury do not make for the violation of constitutional rights." Finally, the Court held that even though the case failed for failure to demonstrate a substantial burden to their associational rights, there were certain compelling state interests that support a blanket primary: allowing each voter to keep party identification secret; allowing the broadest possible participation in the primary election; and giving each voter a free choice among all candidates in the primary. The Court saw the purpose of the statute stated in RCW 29.18.200 to allow:

> All properly registered voters [to] vote for their choice at any primary election, for any candidate for each office regardless of political affiliation and without a declaration of political faith or adherence on the part of the voter.

Id. at 705. This purpose contrasts sharply with that of California's Proposition 198, which was, the Supreme Court observed: "Promoted largely as a measure that would 'weaken' party 'hard-liners' and ease the way for 'moderate problem-solvers'." *California Democratic Party*, 530 U.S. at 570. The Court concluded that the correction of any defects should be left to the legislature or popular initiative. *Id.*

The question is, under these circumstances, does Washington's primary system impermissibly burden the associational rights of the political parties.

C. EVIDENCE ON ISSUE OF BURDEN ON RIGHT OF ASSOCIATION

The political parties must demonstrate to the Court that Washington's primary election laws place a substantial burden upon their First Amendment right of association. *See American Party v. White*, 415 U.S. 767 (1974); *Kadrmas v. Dickinson Pub. Sch.*, 487 U.S. 450 (1988). Whether a burden on a party's associational rights is substantial is a question of law. *See Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 109 S. Ct. 1013, 1018-21 (1989).

The Democratic Party describes its view of the burden placed on political parties by Washington's blanket primary: it claims that the system forces the Party to adulterate its candidate selection process, to have its message changed, and potentially to have the outcome of its primaries altered, and that this burden is the heaviest imaginable. This is, essentially, the burden described by the Republican Party, as well. The Libertarian Party sees the same burdens upon it now that it has moved from minor party to major party status, but sees these burdens as rendering even greater dangers because the Party is yet small.

Through various witnesses, the political parties assert evidence of a substantial burden on their associational rights. The State and the Grange submit evidence on their behalf as well. Some of the expert testimony submitted is the subject of motions to strike on a variety of bases.

1. Expert Testimony–
Michael Snyder, Todd Donovan, Ph.D. and David J. Olson, Ph.D.

In support of their contentions of a substantial burden on their associational rights, the Democratic and Republican Parties rely on testimony of Michael Snyder, whom they present as their expert, as well as the testimony of other individuals.

The State and the Grange rely on the testimony of Professor Todd Donovan and Professor David J. Olson.

The State and the Grange challenge the testimony of Michael Snyder on two bases: (1) he lacks the professional qualifications to give expert testimony, and (2) his report fails to satisfy at

least two parts of the three-part test set forth in Fed. R. Evid. 702 for expert witnesses. Each of these challenges will be discussed in turn.

a. The Experts' Qualifications

Mr. Snyder summarized his education and professional experience in his curriculum vitae. He has a Bachelor of Arts in history and did some post-graduate study of Eastern European history, but did not receive a post-graduate degree. (Snyder Dep. p. 6) He testified at his deposition that he sat in on some political science classes, although he doesn't have any direct recollection of it. (*Id.* p. 7) He stated that he took one class in statistics. (*Id.* p. 6) His work experience includes work on two political campaigns for two different candidates in the Midwest and for the Washington State Democratic Campaign and Caucus as a "Phone Bank Director" involving volunteer callers in one case and paid callers in another wherein he wrote "scripts," trained the callers, did polling, and "voter i.d." He describes his work for the Washington Democratic Campaign and Caucus in September 1990 to April 1991 as involving legislative analysis and constituent relations. He also worked for a Washington consulting company with clients nationwide, where he did a variety of things including copy writing, speech writing, and "targeting," that is, analyzing election data, voter registration, election results. He is currently an independent consultant in Washington doing strategic planning and election analysis, research, and writing.

Defendant Secretary of State Reed and the Grange argue that Mr. Snyder does not have the requisite professional qualifications to give expert testimony; that Michael Snyder may have experience as a campaign consultant, but that he does not have the broad analytical background he would need to express opinions on such a broad topic as the effect of the blanket primary on political parties.

It is true that Michael Snyder lacks training in political science or in statistics, relevant study areas to address the issues in this case. Short of concluding that Mr. Snyder is unqualified as an

expert in this case, the best that can be said is that he lacks the experience, the educational stature, and credentials to be authoritative in his opinions.

In contrast, Todd Donovan, Ph.D. (hereafter Dr. or Professor Donovan), is a professor of political science at Western Washington University, and his teaching areas are American politics, state and local politics; parties, campaigns and elections; comparative electoral systems; research methods and statistics (introductory level). His research areas are electoral systems and representation, political behavior, sub-national politics, direct democracy, political economy of local development. He is widely published, with books, book chapters, edited volumes, and articles in academic journals to his credit. Dr. Donovan's credentials render him an authoritative expert in this case. While the Democratic Party argues that Dr. Donovan's report ought to be excluded because it was late, nevertheless, the delay did not cause harm to the political parties who were able to take his deposition on November 7 and they questioned him about all aspects of his report. Dr. Donovan is qualified as an expert and his report will not be excluded.

David J. Olson, Ph.D.(hereafter Dr. or Professor Olson) is presently a Professor in the Political Science Department at the University of Washington. As reflected in his Curriculum Vitae, he has a large number of books and articles to his credit, he reviews manuscripts for a variety of journals and agencies, he regularly gives speeches, and he has been active as a consultant since 1980. Dr. Olson is certainly qualified as an expert to testify on the matters at issue in this case.

b. Expert Opinion – Federal Evidence Rule 702

Secretary of State Reed and the Grange contend that Mr. Snyder's report fails most of the five factors of the test from *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993)(one of three cases that prompted the revision of Fed. R. Evid. 702 into its present form); they also contend that Mr. Snyder's report fails at least two parts of the three-part test of Fed. R. Evid. 702. Federal Evidence Rule 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

Daubert set forth a list of non-exclusive factors to be considered in evaluating scientific expert testimony: (1) whether the expert's technique or theory can be or has been tested; (2) whether the technique or theory has been subject to peer review or publication; (3) the known or potential rate of error of the theory or technique when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or method has been generally accepted in the scientific community. *Daubert*, 509 U.S. at 593-94. *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999) clarified *Daubert* to include in the Court's "gatekeeper" role the screening of all proposed experts and their work, not just those advancing scientific opinions. In *General Electric Co. v. Joiner*, 522 U.S. 136, 146-47 (1997), the Court confirmed that challenges to the admissibility of expert opinions do not present issues of fact that would preclude summary judgment. The Court stated:

> Trained experts commonly extrapolate from existing data. But nothing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert. A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.

General Electric, at 146, 118 S. Ct. 512, 519.

The political parties asked Mr. Snyder to determine "To what extent did nonmembers of the Democratic Party participate in contested Washington primaries in September 2000? To what extent did nonmembers of the Republican Party participate in contested Republican primaries in December 2000?" (Snyder Dep. pp. 18 and 19) The political parties gave Mr. Snyder a definition of what constituted party membership: "Members of the Democratic Party are defined as registered voters who participated in the February 2000 Washington presidential preference primary, and were

issued a Democratic ballot," and they described members of the Republican Party similarly, referring to the February 2000 presidential preference primary. (Snyder Dep. at 19) Voters who were issued an unaffiliated ballot at the preference primary were not considered to be members of either the Democratic or Republican party. *Id.*

In the Plaintiffs' disclosures of expert testimony, Mr. Snyder's testimony is summarized: By comparing the ballot issuance records between the February 2000 presidential preference primary to the total votes recorded in a party's September 2000 primary, it is possible to determine whether more voters were allowed to participate in the party's primary than were known to be supporters of the party. In Mr. Snyder's "Preliminary Report Washington 2000 Blanket Primary Vote Analysis," he concludes that non-party voters – those who did not cast that party's preference ballot in the 2000 presidential primary – participated in the 2000 Democratic and Republican blanket primary nominations process, often, at all levels of government, and in some cases, such participation was decisive. *Id.* at 16. Further, Mr. Snyder concluded that Democrats and Republicans participated in each other's primary. *Id.*

Mr. Snyder's evidence does not pass the first and second tests of Fed. R. Evid. 702. Mr. Snyder did not make a determination of party membership based on an analysis of relevant data; he merely accepted a definition from the political parties. Then, he reached his conclusions by simply performing mathematical computations. Dr. Donovan pointed to two key flaws in Mr. Snyder's analysis: (1) he used an untenable definition of "member" of the Democratic and Republican Parties by assuming that the only voters who can be regarded as members of the parties are those voters who participated in the February 2000 Washington presidential preference primary and were issued ballots affiliated with those parties; and (2) he used data from the February 2000 presidential preference primary to make estimates of "non-party members" voting in the September 2000 state primary election. Dr. Olson's Statement discussed the issue of political party membership:

> In Washington, voters are not required to indicate party affiliation, adherence to a political party, or even party preference when registering to vote. As a matter of state statutory law, there is no legal basis for determining party membership in Washington State. And, under Washington's blanket primary system, which opens participation in selecting nominees for partisan offices to all registered voters, regardless of party preference, adherence or affiliation, there is no legal or organizational basis for determining party membership.
>
> In the absence of legal requirements to declare party affiliation when registering to vote, or requirements for paying dues to a party, or formally joining a party by signature, or making a public declaration of party adherence, there is no easy or clear way to define membership in political parties in Washington State. Instead, party affiliation in Washington is a psychological state of either identifying or not identifying with one or another of the major or minor political parties.

Statement of David J. Olson, Professor of Political Science, University of Washington, p. 4.

The Republican Party protests the idea that the definition of a political party should be left to a political scientist rather than to the political party itself. Similarly, the Democratic Party argues that

> [t]he State's preference that the Democratic Party organize itself in some other fashion or use some other eligibility requirement is not a basis for disregarding Mr. Snyder's testimony. The determination of how to structure the Party and who is eligible to participate in the Party's candidate selection process belongs to the Party, not the State or its academic experts.

Dem. Party Opp. Memo. at 18. This argument ignores the inherent problem with the political parties' definition of party membership in Washington.

In his declaration, Professor Donovan explained that the 2000 presidential preference primary presented a very biased picture of how voters are affiliated with parties in Washington. (Donovan Decl. at 4-6) For example, and among other things, the primary was weakly contested, as Vice President Gore had already locked up the Democratic nomination before the Washington primary, so there was little incentive for Democrats to turn out. Thus, there would be a substantial under-estimate of the proportion of voters affiliated with the Democrats, and a biased estimate of Republican affiliates would also be produced. *Id.* Professor Donovan also goes on to state that the definition used in the Snyder report would never pass peer review in an academic journal, and that he knew of no study that has ever used this method. (Donovan Decl. ¶ 16) In his deposition,

Professor Donovan testified that his definitions of party affiliation are used commonly in academic journals. (Donovan Dep. at 134; and see Prof. Donovan's "Report on the Consequences of Washington's Blanket Primary" at 1).

Besides using a nonstandard definition of party membership, Professor Donovan cited Mr. Snyder's use of noncomparable data – that is, that something that happened in February would be a measure of the partisan affiliations of voters in September – as another aspect of his report that would not pass peer review. (Donovan Dep. at 135) Professor Donovan was asked whether what Mr. Snyder did wasn't the same as what happened in California – where "they simply counted the votes and analyzed the data based on the registration that was shown on the ballot?" (*Id.* at 210) Dr. Donovan explained that "the act of registering, I would assume, is not biased by a particular election in a particular year, whereas the way that Snyder has done his, who is likely to sign in as a Democrat or Republican in that example is biased by that particular election context." (*Id.* at 211)

Before one can gauge the impact of a primary election system upon a party's associational rights, one must identify political party members. This identification was easily done in California where voters must register their party affiliation, but the same is not true in Washington. The problem of identifying party members in Washington precludes a determination that those outside the party dilute the votes of those within the party. Professor Olson was questioned on this point in his deposition, and his answer highlights the problem:

> Q. Am I correct that you're unable to tell me whether, in this state, the vote of members of the Democratic Party in the Selection of their nominees – you're unable to tell me whether that vote is diluted by the presence or potential presence of independents and Republicans in that process?
>
> A. And the vote that's being diluted is the party members?
>
> Q. Yes.
>
> A. I don't know what "party members" means in the context of this question.

Olson Dep. at 45.

Mr. Snyder's Report is not based upon sufficient facts or data, and the testimony is not the product of reliable principles and methods. Mr. Snyder's mathematical calculations may be correct,

but the serious flaws in his work, as discussed above and elaborated more fully in the reports and testimony of Professors Olson and Donovan, undermine it so as to render it worthless. Mr. Snyder's testimony must be excluded.

It is uncontested that Professors Olson and Donovan have submitted evidence in compliance with Fed. R. Evid. 702.

2. Other Testimony

The testimony of the Democratic Party's witnesses – Paul Berendt, Blair Butterworth, and Don McConough – and the exhibits submitted with their declarations; the testimony of the Republican Party's witnesses – Christopher Vance, Dale Foreman, John Meyers, and Thomas Lowry – and the exhibits submitted with their declarations, are the subject of motions to strike made by the Secretary of State. The State argues that this testimony must be excluded because it includes opinions, and these witnesses were not designated as experts, nor were the required disclosures made pursuant to Fed. R. Civ. P. 26(b)(4) and Local CR 26(a)(2); their testimony is thus rendered inadmissible under Fed. R. Evid 702. Moreover, their opinions and conclusions are not supported by detailed supporting data. The State also argues that these witnesses may not give opinions based on "scientific, technical, or other specialized knowledge" as lay witnesses under Fed. R. Evid. 701. Finally, the State argues that the opinions lack foundation, appear to be based upon hearsay, in part, or are simple conclusions, or are speculative. Regarding Thomas Lowry's testimony, the State argues that his description of his candidacy and the reasons for it are irrelevant.

The Democratic Party argues that their witnesses were available for deposition, they were disclosed as experts, citing that they may produce evidence under Fed. R. Evid 702, 703, or 705, and that they were not required to produce the additional disclosure that is required by Fed. R. Civ. P. 26(a)(2)(B) because these witnesses were not "retained" or "specially employed" to provide expert testimony. The Republican Party makes a similar argument.

a. Expert Opinion – FRE 702 and Fed. R. Civ. P. 26(a)(2)(B)

The point of Fed. R. Civ. P. 26(a)(2)(B)'s requirement of a written report for testifying expert witnesses is to provide more substantive information as an aid in preparation to depose the expert. This requirement does not turn on whether the witness is paid a fee. "Rule 26 focuses not on the status of the witness but rather on the substance of the testimony." *Zarecki v. Nat'l R.R. Passenger Corp.*, 914 F. Supp. 1566, 1573 (N.D. Ill. 1996). The political parties' arguments on Rule 26's requirements are not well taken.

The declarations of the above-referenced witnesses include opinions that the outcomes of elections have been changed because the votes of "true believers" were diluted by the votes of non-party members, that the parties' political message is altered or adulterated by the blanket primary, that candidates elected under the blanket primary are "philosophically different," that the blanket primary increases the cost of primary election campaigns, and that the blanket primary "disillusions" party regulars and decreases their commitment to party activities. (See State's Response at 9 and citations to declarations therein) Much of the substance of these witnesses' testimony was addressed in the expert testimony of Professors Donovan and Olson, who are qualified to give such opinions, and the basis for their opinions is also known. The above-listed witnesses predicate their opinions on technical or other specialized knowledge that they have gained throughout the course of their service in the political parties' hierarchies or their careers as political consultants. The Court must carefully scrutinize testimony based on such experience:

> If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. *The trial courts' gate keeper function requires more than taking the experts' word for it.*

KW Plastics v. United States Can Co., 131 F. Supp. 2d 1289, 1292 (M.D. Ala. 2001)(emphasis in original). The political parties' witnesses listed at the beginning of this section do not survive careful scrutiny. There is no data analyzed, no disclosure of methods employed, nor factual bases

for their opinions disclosed. The Court declines to accept the above-referenced witnesses' testimony as opinion testimony from experts.

b. Lay Opinion Testimony – FRE 701

The political parties argue that the subject declarations from past and current party officials and their political consultants may be admitted as lay opinion testimony under Fed. R. Evid. 701, which provides as follows:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

The Advisory Committee Notes to the 2000 Amendments explain the import of this Rule:

> Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g*, 57 F.3d 1190 (3d Cir. 1995). By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in Fed. R. Civ. P. 26 and Fed. R. Crim. P. 16 by simply calling an expert witness in the guise of a layperson. *See* Joseph, *Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure*, 164 F.R.D. 97, 108 (1996)(noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the *expert disclosure and discovery process*")

A review of the Declarations of the above-listed (Section 2 above) political party witnesses reveals that these witnesses are not simply testifying to ordinary matters within the realm of common experience, such as the appearance of persons or things, but these witnesses are giving their opinions, based on their purported experience and specialized knowledge, about the ultimate issues in the case: whether the blanket primary has caused harm to the political parties. Such testimony is improper lay opinion. *See Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 460 (5th Cir. 1996)(lay opinion testimony proper only if opinion and inferences do not require any specialized

knowledge and could be reached by ordinary persons). The danger here is that rather than the factual underpinnings consisting of empirical data, the witnesses' conclusions are supported by their experience (an amorphous matter in most cases), isolated anecdotal evidence, or belief. This kind of evidence going to critical aspects of this case does not make for proper opinion testimony – lay or expert – and it must be excluded. *See Hestor v. BIC Corp.*, 225 F.3d 178, 182 (2d Cir. 2000).

3. Insufficient Evidence of Burden

Even if one were to accept Mr. Snyder's report and the unobjectionable aspects of the political parties' lay witnesses' testimony, there is insufficient evidence to rebut the testimony of Professors Donovan and Olson. The Court would weigh the Snyder report against the professors' testimony and find that its infirmities rendered it worthless. Similarly, the Court would consider the political parties' other witnesses' testimony and find it to be insubstantial and wholly insufficient in the face of the professors' testimony.

There is before the Court, nevertheless, other evidence that is competent on the issue of whether there is a substantial burden to the political parties' associational rights, and this evidence demonstrates that there is no such burden. Professor Olson stated that while there may be effects of the blanket primary, he did not agree with the political parties as to the magnitude, the frequency, the scope of the effects, or whether they constitute "burdens" on the parties. Professor Olson also thought that there may not actually be a burden on the political party, because it may benefit by having candidates selected who may actually be more likely to win the general election. (Decl. of David J. Olson, p. 3, ¶ 7; and *see generally,* Olson Statement, competition for votes, pp. 5 & 6) Professor Olson stated that there is no legal or organizational basis for determining party membership; in the absence of party registration, state party membership is a matter of psychological identification. (Olson Decl. ¶ 11; Statement of David J. Olson, p. 4)

Professor Olson reviewed the harms and burdens that the opponents of the blanket primary have alleged and compared these with empirical studies by political scientists. (See discussion at pages 5-11 of Professor Olson's Statement.) He explained that political scientists view political parties as composed of three elements: (1) the party as organization, (2) the party in government, and (3) the party in the electorate. As to the party as organization, citing the findings of several studies of the subject, Professor Olson concluded that the alleged harms and burdens inflicted upon political parties in Washington are without foundation. (Olson Statement, pp. 5-13)

> The empirical findings on the strength of parties as organizations may be summarized: Washington political parties successfully sustain a wide range of activities, rank high nationally on measures of organizational strength, are among the most two-party competitive in the nation, are active in raising money for candidates and remain the single most important agency for recruiting and promoting candidates for public office.

(Olson Statement, p. 7)

As to the "Party in Government," while Paul Berendt (Chair of the Washington State Democratic Central Committee) opines that elected officials selected through a blanket primary "give low or no priority" to party goals (Berendt Decl. p. 4, ll. 11-23), Professor Olson found this contention to be "absurd," because "Party is the single best predictor of how officials behave once in office." (Olson Decl. ¶ 15; Olson Statement, (citing a study) p. 8) Furthermore, Professor Olson discussed how the "Parties in Government" exercise power in a coordinated way. From a detailed discussion, he concludes:

> From the above, in Washington State it is the party in government that organizes the legislature and decides on leadership hierarchies, sets the agenda, enforces party cohesion, and creates the LCCs [legislative campaign committees] for fund raising *and other campaign support activities.*

(Olson Statement, p. 9)

In beginning his discussion of the "Party in the Electorate," Professor Olson cites the parties' criticisms of the blanket primary: the "pernicious effects" of cross-over voting with malicious intent and the filing of phony candidates. (Olson Statement, p. 9) He notes that there are

broad, secular trends across the 50 states, such as the rise of candidate-centered campaigns, the consequences of which must be distinguished from effects attributable to the blanket primary, per se. He notes that party loyalties in the electorate across the United States and in Washington are weaker, and that there has been a rise in the use of legislative campaign committees (LCCs), PACs and independent expenditure groups as a partial replacement of political parties' roles. *Id.* Nevertheless, studies show that "The distribution of party loyalties in Washington generally resembles national patterns." *Id.* Professor Olson concludes further:

> *It may then be said that the two parties hold issue positions at substantial variance* with each other, they recruit candidates reflective of those issue positions, and once elected, partisan members of the legislative bodies significantly reflect the different positions represented by the parties and distributed through the electorate.

(Olson Statement, p. 10) Studies also conclude that cross-over voting with malicious intent simply does not occur. "There has been little evidence in the state of Washington of 'raiding' by regulars of the opposition party in order to secure the nomination of a candidate felt to be a weaker opponent." *Id.* Such a strategy, sophisticated though it is, is equally available in all direct primaries, whether of the closed, open, or blanket variety. (*See* Olson Statement, 10, 11) The parties speak often of their message being diluted by competing for votes across the whole electorate in the blanket primary. There is, however, a larger interest at stake: "Voters who note the disjunction between message content in the primary versus general election raise questions about candidates' sincerity, and which positions they really advocate." (*Id.* at 11)

Absent a means of identifying voters' political party affiliation, there is no way to determine that cross-over voting has occurred. The Grange points out that the Supreme Court cited the Ninth Circuit's definition of cross-over voting (See *California Democratic Party* 530 U.S. at 579 n. 9), and that when Professor Olson was asked whether in Washington there were cross-over voters defined as one voting in a party to which they are not registered, Professor Olson answered "No."

(Olson Dep. p.107-8) This was the only possible answer, as there is no registration of voters by party in Washington.

Professor Donovan addressed the blanket primary's influence on public attitudes toward political parties. He stated: "Survey data suggest that voter attachments to parties, and partisan behavior in the electorate in Washington, are virtually identical to that observed in comparable states that use closed primaries." (Donovan Report p. 1) He continued: "A body of empirical work documents that public evaluations of political institutions are enhanced by electoral arrangements that allow voters more, rather than less, direct political participation." *Id.*

Professor Donovan also points out that while the political parties complain that they did not prefer some candidates who actually captured the party's nominations, "there is no data provided, however, that establishes that the party's self-identified voters did not prefer these candidates." (Donovan Supp. Decl. p. 11)

A concrete example given by Professor Donovan is Jennifer Dunn's campaign for Congress in 1992. The Republicans claim, through Mr. Meyers (former Executive Director of the Washington State Republican Party, and a consultant since 1993), that there was harm to the party in the way that she sought broad support in the primary. (Meyers Decl. p. 4) Professor Donovan pointed out that "No data or evidence is provided to establish that Dunn was not the nominee preferred by actual Republican voters in her 8th District. No evidence is provided that establishes that cross-over voting affected the outcome of this race." (Donovan Supp. Decl. p. 12)

Another example advanced by the Republican Party is the Louisiana primary where David Duke ran as a Republican and won. (See Vance Decl. p. 6) The Louisiana system was the one cited by Justice Scalia as a permissible nonpartisan blanket primary where the top two (or however many a state prescribes) vote getters move on to the general election. (See Donovan Supp. Decl. p. 12) Professor Donovan notes that the Vance Declaration provided no evidence that Duke was not the preferred candidate of actual Republican voters, and noted additionally that analysis of surveys

conducted in the 1991 Louisiana Gubernatorial runoff election found that Republicans were significantly more likely to vote for Duke than Democrats. *Id.*

The Democrats submit that the nomination of Democrat Dixy Lee Ray for the office of Governor *in 1976 occurred only because Republicans, independents, and other non-Democrats cast* votes for Ms. Ray in the 1976 primary. (Dem. Mot. At 11, with ref. to Olson and Butterworth Deps. and Butterworth Decl.) Apart from Butterworth's mere assertion, however, there is no evidence of this fact.

The political parties' evidence that there is a burden on their constitutional right of association is, for the most part, incompetent and inadmissible, and at best, it is insubstantial and speculative; the political parties have failed to carry their burden of proof.

IV. CONCLUSION

The political parties have not demonstrated that there is evidence of a substantial burden to their First Amendment right of association. Accordingly, the motions of the Democratic Party and the Republican Party must be denied.

The Defendants Secretary of State and the Grange have demonstrated that Washington's blanket primary is a constitutional exercise of the State's power to regulate elections, as they have shown that the political parties have failed to come forth with sufficient evidence to prove the blanket primary's unconstitutionality. Summary judgment is proper if a defendant shows that there is no evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The State has shown that the political parties have failed to demonstrate the element of burden on their constitutional right of association. Accordingly, the State's motion for summary judgment must be granted.

NOW, THEREFORE,

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IT IS ORDERED:

1. Motion of Defendant Sam S. Reed, as Secretary of State of Washington for Summary Judgment (Doc. # 268) is GRANTED;

2. Motion of Plaintiff Washington State Democratic Party for Summary Judgment (Doc. #261) is DENIED;

3. Motion of Intervenor Republican State Committee of Washington for Summary Judgment (Doc. # 273) is DENIED;

4. The following Motions of Defendant Reed to Strike are GRANTED:

   a. Strike Declarations Submitted on behalf of Washington State Democratic Party's Motion for Summary Judgment (Doc. # 289)

   b. Strike Declarations Submitted on behalf of Republican Intervenors' Motion for Summary Judgment (Doc. # 290) and

   c. *Strike Declaration of Michael Snyder and Expert Report and Attachments* (Doc. # 291)

5. This cause of action is DISMISSED, and the Clerk of the Court shall enter JUDGMENT in favor of Defendants.

DATED this 21 day of March, 2002.

FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

ec

United States District Court
for the
Western District of Washington
March 27, 2002

* * MAILING CERTIFICATE OF CLERK * *

Re: 3:00-cv-05419

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